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Cause No. 11CG-CC00272

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*Issuance of Permit Pursuant to Revised Mine Plan Boundary - Exhibits B and C).*

On January 27, 2011 the LRC conducted a public hearing to allow parties the opportunity to argue they had standing (as defined by §444.773 R.S.Mo) for an evidentiary hearing on the issuance of the permit. *(See RECORD ON APPEAL Vol. II - Petitioner's Exhibit C).* On February 7, 2011, the LRC granted Petitioner Saxony's request for a formal public hearing and the matter was referred to Hearing Officer W. B. Tichenor. *(See RECORD ON APPEAL Vol. I - Order Upon Assignment of Matter to Hearing Officer).*

A hearing was conducted regarding Petitioner Saxony's claims over the course of four days from July 5, 2011 to July 12, 2011. *(See RECORD ON APPEAL Vol. II - Transcript of Proceedings).* After Petitioner Saxony rested its case, Respondent Strack requested a directed verdict based upon the fact that Saxony had failed to meet its burden to establish by competent and substantial scientific evidence on the record that the proposed quarry would unduly impact Petitioner Saxony's health or livelihood. *(See RECORD ON APPEAL Vol. II - Transcript of Proceedings, pages 697-704).* Strack's motion for directed verdict against Saxony was taken under submission and subsequently granted on July 18, 2011. *(See RECORD ON APPEAL Vol. I - Order Granting Motion for Directed Verdict).* Accordingly, based upon the record, Petitioner Saxony was provided opportunity for a full and complete hearing on its concerns, yet no issues were found to exist with respect to any of the public concerns Petitioner Saxony raised regarding the proposed quarry.

No dispute exists in this matter that Strack's permit application complied with § 444.771 as it existed at the time of its submittal. However, while the hearing was taking place, House Bill 89 was signed into law which revised §444.771 R.S.Mo. to state the following:

Notwithstanding any other provision of law to the contrary, the commission and the department shall not issue any permits under this chapter or under chapters

643 or 644 to any person whose mine plan boundary is within one thousand feet of any real property where an accredited school has been located for at least five years prior to such application for permits made under these provisions . . .

Strack's application was submitted before any proposed revision to § 444.771 and well before any passage or enactment of the revision to § 444.771. Further, Strack had already been issue its water permit and its air permit prior to the passage or enactment of the revision.

In response to this development and a motion by Saxony, the Hearing Officer issued an order which stated the following:

The statue does not prohibit the Commission from issuing a mining permit to the Applicant upon the condition that the mine plan boundary is beyond one thousand feet of the Saxony property. The tract of land on which the proposed Strack Quarry #2 would be located is of such size and configuration that the quarry could be outside the one thousand foot barrier established by the legislature. The Commission may still act on the pending application and satisfy the mandate of §444.771.

*(See RECORD ON APPEAL Vol. I - Order Denying Motion for Accelerated Determination).*

In an effort to be consistent and compliant with the newly revised law, Strack did not object to the suggested conditions on its mine plan boundary, i.e. that its quarry would not located within 1,000 feet of the boundary of Saxony Lutheran High School's real property. *(See RECORD ON APPEAL Vol. I - Applicant's Memorandum Regarding Hearing Officer's Proposed Condition Regarding Revision of Mine Plan Boundary)*. Specifically Strack filed its Memorandum Regarding Hearing Officer's Proposed Condition Regarding Revision of Mine Plan Boundary, which stated the following:

In the event, the Hearing Officer and/or the Land Reclamation Commission deems that the revised provisions of Section 441.771 are applicable to the permit application of Strack which was pending prior to passage of the statute at issue,

Strack in order to comply with the revision to the law since its permit application was filed, is willing to agree to conditions recommended by the Hearing Officer and/or imposed by the Land Reclamation Commission to modify its proposed mine plan boundary so that Strack's mine plan boundary (exclusive of any underground mining) is not located within 1,000 feet of Saxony Lutheran High School's real property. (*Id.*)

On August 24, 2011, Hearing Officer Tichenor issued his Recommended Order, a detailed 29 page analysis of the issues, which recommended that the permit be approved conditioned upon the mine plan boundary being located one thousand feet from the Strack - Saxony property line to comply with the newly revised § 444.771. (*See RECORD ON APPEAL Vol. I - Recommended Order*). On September 22, 2011, the LRC entered its Final Order adopting the Recommended Order prepared by Hearing Officer Tichenor. (*See RECORD ON APPEAL Vol. I - Final Order*). Specifically, the Final Order provided that:

Hearing Officer, W.B. Tichenor issued his Recommended Order on August 24, 2011, that: the Application for Expansion of permit # 0832 be approved with the mine plan boundary (exclusive of underground mining) to be located one thousand feet from the Strack - Saxony property line, in compliance with and as required by section 444.731 RSMo.

IT IS HEREBY ORDERED THAT:

- 1) The hearing officer's Recommended Order is adopted and approved in full  
...
- 3) The captioned administrative appeal is decided against Petitioner and in favor of the Respondent and Applicant. . . .

(*See RECORD ON APPEAL Vol. I - Final Order*). Saxony has filed this matter appealing the LRC's Order.

Petitioner's appeal in this matter is premised upon the argument that the LRC, the Hearing Officer and/or Strack, lacked any authority to impose additional conditions, alter or in any way

modify the permit application. Petitioner offers no Missouri case which holds that Strack or the LRC is prohibited from such actions. To the contrary, as addressed in detail below, Petitioner's argument is counter to *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38, 41-42 f.n. 4 (Mo. App. 2010)(application for an expansion permit approved with special conditions imposed by the hearing officer and revisions to the permit application were not improper absent a showing of prejudice). Further, Saxony's argument ignores the statutory scheme and plain language of the statute which allows the LRC to balance the public's interests with the proposed mining activity during the permit process and to make recommendations and resolve public concerns. Despite such directives and statutory language, Petitioner argues that the LRC is solely limited to making a "thumbs up or thumbs down" decision on the permit. As detailed below, Petitioner's argument is counter to the statute's language and must be rejected.

For the reasons set forth herein, the decision of the LRC was in all respects lawful and proper and should be upheld by this Court. Accordingly, Respondent Strack respectfully requests that judgment be entered in favor of Respondents and against Petitioner in the above-styled cause of action.

## **II. Argument**

Petitioner's Brief argues in essence that the LRC, the Hearing Officer and/or Strack, lack any authority to impose additional conditions, vary or in any way modify the permit application. Petitioner offers no Missouri cases which specifically hold such. To the contrary, this argument is directly counter to the holding of, and past practice reflected in, *Lake Ozark/Osage Beach Joint Sewer Board v. Mo. Dept. of Natural Resources*, 326 S.W.3d 38 (Mo. App. 2010). First, in *Lake Ozark* the hearing officer recommended that an application for an expansion permit be approved

only with special conditions imposed by the hearing officer. The original mine plan requested mining of 205 acres, but approval was limited to 52 acres. *Id.* at 39, 41. Further, The hearing officer imposed numerous additional special conditions with respect to approval of the permit, including restricting the days, times, and location of the blasting with regard to the sewer line easement; using seismographs to monitor the sewer plant and sewer lines; and restricting the elevation of the mine floor to run at or above the grade of the sewer line easement. *Id.* As reflected in *Lake Ozark*, the practice of imposing special conditions as part of the permit process is not uncommon and is entirely consistent with the LRC's goal and purpose of striking a balance between the public's interests and the proposed mining activity during the permitting process. Further, the conditions imposed by the Hearing Officer in *Lake Ozark* were far more extensive than in the present matter.

Moreover, in *Lake Ozark* the permit was issued even though changes were made to it during the application process. In *Lake Ozark*, the applicant's original permit application was not correct; specifically utility easements were not shown in the maps submitted by the applicant as required by 10 CSR 40-10.020(2)(E). *Id.* at 41. The application was later revised by the applicant to include this additional information midway through the process (and after required publication regarding the mine plan). *Id.* at 41-42. As in the present matter, parties opposing the permit argued that any change to the proposed permit required the applicant to start the entire process over from the beginning. The court rejected such arguments holding that where all information was before the Land Reclamation before the issuance of the permit (as here) and where no prejudice results from the change (as here, as detailed below), issuance of the permit by the Land Reclamation Commission was not improper or illegal. *Id.* The same result is applicable here.

In the present matter, the modification of Strack's mine plan during the process is far less

problematic than in *Lake Ozark*. Unlike the applicant in *Lake Ozark*, Strack's modification does not seek to rectify any errors or omissions on Strack's part in the application process. To the contrary, Strack's original mine plan was fully compliant with the law that existed at the time it submitted its application. The change offered by Strack is wholly the result of a change in the law that occurred after the permit application. Unlike *Lake Ozark*, the modification is not the result of any mistake, fault or oversight on the part of Strack. It was simply an effort to bring the permit into compliance with a change to the law that occurred at the very end of the permitting process. The suggestion that modification of the permit to correct errors by the applicant uncovered midway in the permit process (as in *Lake Ozark*) is allowable, but that modification of an application, which was accurate and compliant with the law when made, to conform to changes in the law during the permitting process is summarily prohibited, defies logic.

As the court in *Lake Ozark* held, a revision during the permitting process does not serve as a basis to overturn the LRC's decision absent a showing of prejudice. The conditions imposed and modification of the mine plan simply reduced the proposed mineable acreage by moving the boundary 1,000 feet from the school. It did not revise any other boundary, did not expand or change any other mining locations, and did not change anything of substance within the mine plan. Since the modification substantially limits and reduces the scope of mining set forth in the original application, absolutely no prejudice exists or can be shown by Petitioner.

It would be specious for Petitioner Saxony to argue it could have attempted to present a case of greater impact to its health, safety or livelihood in this hearing based upon a mine plan whose only revision is that it is much smaller and more limited than what was originally proposed. Saxony had a full evidentiary hearing on its concerns regarding the original proposed mine plan. After four days of testimony, the Hearing Officer found that Saxony failed to establish proof for any claim that

the proposed quarry would have any undue impairment on the health or livelihood of Petitioner. (See RECORD ON APPEAL Vol. 1 - Recommended Order at pg. 20). It is baseless to suggest that a different result would have occurred, or that Petitioner Saxony has somehow been prejudiced, due to the far more restrictive conditions imposed on the mine plan. If no impact was shown during the evidentiary hearing for the original mine plan, it is beyond cavil that no impact similarly exists for the mine plan that the Hearing Officer subsequently approved which substantially reduced the mineable acreage due to the imposed 1,000 foot setback to comply with the newly revised § 444.771.

It similarly defies logic to suggest that persons who did not challenge the original mine plan, would have petitioned for hearing based upon this far more limited mine plan. It is equally illogical to assert that persons who were denied standing under the original plan would have been granted standing under the subsequent reduced and far more limited mine plan. Quite simply, absolutely no prejudice can be claimed by any party as a result of the conditions imposed and revision to Strack's mine plan. In short, the modification did not create any potential additional public concerns, but realistically only lessened them. Under the holding of Lake Ozark the lack of any prejudice to Petitioner bars its objections regarding the modification.

Strack's mine plan was fully compliant with the law at the time it was submitted. Strack has incurred substantial time and cost fully complying with the established process. It has obtained the necessary air and water permits, and complied with publication and notice requirements. It has gone through informal public hearings and a four day hearing in which Petitioner Saxony was provided full opportunity to present any evidence of any claimed impact to its health or livelihood. After completion of this process, the Hearing Officer and LRC determined that no impact to Petitioner Saxony exists. At all stages Strack has fully complied with the law as it existed. The



only issue, one that was beyond Strack's control, is a revision to § 444.771 occurring at the eleventh hour of the process which mandates a 1,000 foot setback from any school. The Hearing Officer conditioned approval upon this 1,000 foot setback being incorporated into the permit plan to comply with the new statute, and Strack agreed to revise its permit plan accordingly. Absolutely no prejudice has resulted to Petitioner Saxony in this matter - it has had its opportunity for a full and fair hearing on its claims.

Under these circumstances, it is unreasonable to suggest that Strack must begin the entire process anew and incur significant costs and delays in repeating the exact same process. Given that Strack is solely being required to limit and reduce its proposed mine plan from what was originally proposed, and given the lack of prejudice to Petitioner since a full evidentiary hearing has already occurred, starting over would serve no purpose other than to delay the same result and would be an inefficient and wasteful use of government and judicial resources. The court in *Lake Ozark* has expressly rejected such an outcome. In short, no basis exists to overturn the decision of the LRC in this matter under the circumstances presented.

Petitioner's arguments that the LRC was prohibited from approving the mine plan, or any revision to it, as a result of the passage and enactment of a revised § 444.771 is also rejected by the Constitutional prohibition against retrospective operation of laws. Article I, Section 13 of the Missouri Constitution provides "[t]hat no ex post facto law... retrospective in its operation... can be enacted." A statute is retrospective in operation where it takes away or impairs a vested or substantial right or imposes a new obligations, duties, or disabilities with respect to a past transaction. *Rice v. Huff*, 22 S.W.3d 774, 782 (Mo. App. 2000); *See also, Mo. Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. 2010). A retrospective law is one that relates back to a previous transaction giving it a different effect from that which it had under the

law when it occurred. *Rice*, 22 S.W.3d at 783. No law is allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice to the parties interested. *Rice*, 22 S.W.3d at 782; *Rayford*, 307 S.W.3d at 693. State differently, “a law must not give to something already done a different effect from that which it had when it transpired.” *Rice*, 22 S.W.3d at 782-83.

Here, the newly revised §444.711 imposes new obligations, duties, or disabilities with respect to past transactions on the part of Strack and does so to the substantial prejudice of Strack. Strack has incurred significant time and expense proceeding with the application process and at all times has done so consistent with the law as it existed at the time. Strack’s application and mine plan were entirely consistent and compliant with the law when it was filed. Strack has obtained an air permit and a water permit as required by the process. It has performed its required notice and publication requirements. It has participated in a public hearing, and subsequently participated in a four day formal evidentiary hearing. Over the course of a period of eight months, from the time of its application in November, 2010 until Petitioner was provided a full evidentiary hearing in July, 2011 at which Petitioner’s claims were denied, Strack has fully acted in accordance with the law as it existed and has incurred substantial cost and expense doing so. Petitioner now argues that all such work and efforts, although entirely compliant with the existing law, should retrospectively be negated by passage of the revised § 444.771 since it imposes differing obligations on Strack (i.e. the entirely new requirement of a 1,000 setback from Strack’s property boundary with a neighboring school). Given established Missouri precedent that no new law shall act retrospectively to impose new obligations, duties, or disabilities with respect to a past transaction to the substantial prejudice of the interested parties, Petitioner’s argument must be rejected.

Petitioner Saxony also contends that the LRC lacked statutory authority to condition or allow modification of the permit plan. Again this argument does not withstand scrutiny. Missouri case law notes that the Missouri General Assembly created a comprehensive statutory scheme to regulate the mining industry and delegated to the Land Reclamation Commission the authority to enforce this scheme. *State ex. rel Missouri Land Reclamation Commission V. Calhoun*, 34 S.W.3d 219, 220-21 (Mo. App. 2000). The statutory scheme empowers the Commission to, “among other things, adopt rules and regulations, conduct investigations, examine and pass on new conservation plans, monitor compliance with mining regulations, conduct hearings, and order the forfeiture of bonds for failure to take corrective actions . . . revoke permits, order the cessation of mining operations, and to institute legal proceedings to enforce the statutory scheme and its own orders.” *Id.* Further, the Declaration of Policy for the Land Reclamation Act provides that it is the “policy of this state to strike a balance between surface mining of minerals and reclamation of land subject to surface disturbance by surface mining as contemporaneously as possible, . . . and to protect and promote the health, safety and general welfare of the people of this state. Section 444.762 R.S.Mo.

Implicit within such directives must be the ability to act during the permitting process to balance the public’s interests with the proposed mining activity. If the LRC is charged with striking a balance between surface mining and the interests of the public, it must be allowed the power to direct and condition surface mining upon terms and conditions that it deems appropriate to achieve that goal. To hold otherwise would require a finding that the LRC is granted broad, comprehensive and discretionary powers to regulate the surface mining industry, but is not vested with any authority to modify or condition a permit application upon terms and conditions when necessary to carry out its stated directive. Logic dictates against such an argument.

As here, circumstances after the filing of the permit application can and do change. Issues can be raised during the process, including during any public or formal hearing, that might merit changes to, or imposing conditions within, the application, but which do not merit wholesale rejection of the permit. Accordingly, the LRC must have the authority to adapt and react accordingly to such changed circumstances by crafting an appropriate resolution. Any argument to the contrary ignores the purpose and comprehensive nature of the statutory scheme adopted by the legislature. The LRC, including the hearing officer, must be allowed to impose whatever conditions it deems necessary to fully carry out the LRC's duty and directive to regulate the mining industry and ensure that any permit issued is consistent with the law and is balanced with any legitimate concerns of the public.

This is especially true in the circumstances of the present case. Here, Strack's mine plan and permit application was compliant with the law as it existed at the time the application was submitted. Only after the permit application was submitted have efforts been undertaken to change the law and get a bill passed that would alter the requirements for Strack's planned mine boundary. This is not a case in which the condition that is being sought to be imposed (i.e. limiting the mine plan's boundary's to comply with the 1,000 foot requirements in the recently enacted statute) is something that would or should have been included by Strack as part of its permit application at the time it was submitted, but was ignored or disregarded by Strack. This is simply a case of the law being changed during the permitting process and a corresponding effort to revise the permit application to ensure compliance with that change in the law. The suggestion by Saxony that there is something improper in the LRC acting to revise the permit solely to comply with recent changes in the law is disingenuous, and wrongly suggests that the LRC should put form over substance by

rejecting the permit, when a more proper and logical solution exists - limiting and conditioning the mine boundary in the application to bring the permit in compliance with the changed law.

Further, the proffered argument that the statutory language does not allow for such actions by the LRC is misplaced and ignores the language used. The seminal rules of statutory construction are not disputed. The goal is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning. *Turner v. School District of Clayton*, 318 S.W.3d 660, 665 (Mo. banc 2010). Importantly, each word, clause, sentence and section of a statute should be given meaning. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 37 (Mo. banc 1993). “Where a statute's language is clear, courts must give effect to its plain meaning and refrain from applying the rules of construction unless there is some ambiguity.” *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. banc 2010). Where statutory interpretation is necessary, statutory language is considered in context and in comparison with other sections to determine its meaning. *Id.*

Section 444.773 specifically authorizes the Land Reclamation Commission, if written request is made to “grant a public hearing to formally **resolve** concerns of the public.” R.S.Mo. 444.773.3 (emphasis added). Section 444.789 sets forth the administrative procedure if such a hearing is granted. It provides that the designated hearing officer shall “hold the hearing and make **recommendations** to the commission, but the commission shall make the final decision thereon . . . .” R.S. Mo. 444.789 (emphasis added).

The argument offered by Petition ignores the language used in R.S.Mo. 444.789. That statute specifically provides the hearing officer has authority to hold the hearing and make **recommendations** to the LRC. Of importance the word used by the legislature - recommendations - is plural and not singular. If the hearing officer was limited to hearing the evidence and solely

ruling either “yes” or “no” on whether the permit should issue exactly as submitted, his authority would be limited to making a singular recommendation. That is not the language the legislature used. Instead the hearing officer is charged with making “recommendations.” The use of the plural form necessarily indicates that what is required of the hearing officer is more than just a singular decision on whether the permit should be issued. “Recommendations,” plural, encompasses a far greater level of activity by the hearing officer and the LRC, including recommending appropriate terms and conditions to the permit based upon the evidence at the hearing, the very process that occurred in *Lake Ozark/Osage Beach Joint Sewer Board*. See, 326 S.W.3d at 41-42 f.n 4 and the process that occurred in the present matter. Petitioner’s argument would revise the language of the statute to limit the hearing officer solely to making a singular recommendation. That is not what is written in the statute and such an argument ignores the plain and ordinary meaning of the language used by the legislature.

Further, this conclusion is entirely consistent with the language of Section 444.773 which authorizes a public hearing to **resolve** concerns of the public. A common definition of “resolve” in such a context means to “to deal with successfully, to clear up, **to find an answer to.**” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, Tenth Edition (1993)(emphasis added). Such language reasonably contemplates that the hearing officer may attempt to impose conditions to the permit application to address and “find an answer to” any public concerns that are established at the hearing. Petitioner’s reading of the statute improperly mandates far too narrow of a definition of the word “resolve.” Again, “resolution” of public concerns indicates that the hearing officer is to do more than simply hear the evidence and issue a “yes” or “no” decision on the permit application. The Hearing Officer is not charged solely with deciding the case, but is charged with resolving the issues. “Resolving” the concerns of the public, including making recommendations, amply

reflects that the Hearing Officer's and LRC's authority includes proposed changes or conditions that address and rectify any legitimately proven public concerns. Petitioners' arguments that the LRC and the Hearing Officer is not vested with such authority are again counter to the language used in the statute.

Finally and similarly, pursuant to rules promulgated by the Department of Natural Resources, any effected person can request a public meeting with the applicant, the purpose of which is to attempt to resolve any concerns. *See* 10 CSR 40-10.080. It makes no sense that if the applicant elects to have a public meeting, that the applicant is solely limited to attempting to convince the public that their concerns are not correct, and cannot modify, change or condition its operations based upon the public comments in an effort to resolve such concerns. Again, such a narrow interpretation defies logic and would preclude any efforts to strike a balance between the applicant's mine plan and any legitimate concerns of the public, thereby defeating the entire process and the statutory scheme. This Court must reject such an argument.

### **III. Conclusion**

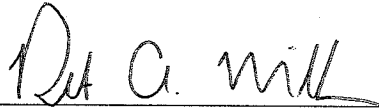
In conclusion, in contravention of the holding of *Lake Ozark* and ignoring the language of the statutory scheme, Petitioner Saxony argues that the LRC's authority in this matter is solely limited to approving or disapproving the proposed permit exactly as submitted, without any ability to change or condition the application. Such an argument is without merit. Petitioner's position unduly promotes form over substance, ignores the statutory scheme providing the LRC with broad discretionary powers, and ignores the language used and intent of the legislature. Further, Saxony had a full evidentiary hearing on the issues and lost. Its current suggestion that it should get a "do-over" when the only conditions imposed on the permit plan do not prejudice Saxony, but actually favor it by moving the boundary of the mine plan 1,000 feet from its

property line, is both specious and disingenuous. The argument is also particularly egregious in this case since all that was sought to be accomplished by the revision to the permit plan was to revise it to comply with a change in the law that occurred while the permitting processing was ongoing.

The decision of the LRC to grant the permit conditioned upon compliance with the newly enacted provisions of §444.771 was proper and lawful, and should be upheld by this court by entry of judgment in favor of Respondents and against Petitioner.

McCARTHY, LEONARD, KAEMMERER, L.C.

BY:

A handwritten signature in dark ink, appearing to read "R. A. Miller", is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 9<sup>th</sup> day of May, 2012, a true and correct copy of the foregoing was served via U. S. Mail postage paid to the following:

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